In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

ESTATE OF W. R. OLSEN, DECEASED, KENNETH W. OWEN, ET AL., EXECUTORS, AND HAZEL D. OLSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (App. 8a-17a)[1] is not officially reported. The opinion of

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[1] "App." refers to the appendix to this petition; "Tr." to the typewritten transcript of the hearing before the Tax Court. The record was not printed in the Court of Appeals, and the case was heard on the original record, which has been certified to this Court. For the Court's convenience, we have printed the Tax Court's findings and opinion in the appendix to this petition (App. 8a-17a).

the court of appeals (App. 1a-7a) is reported at 302 F. 2d 671.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1962 (App. 8a). On July 30, 1962, by order of Mr. Justice White, the time within which to file a petition for a writ of certiorari was extended to and including September 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Upon the death of an officer of a corporation, the board of directors authorized the payment, out of corporate assets, of $5,000 to his widow. The question is whether the payment so authorized was a "gift" excludible from the widow's gross income under § 102(a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> Sec. 102. Gifts and Inheritances.
>
> (a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.
>
> * * * * *

STATEMENT

W. R. Olsen died on September 12, 1955. He was then the secretary-treasurer and a director of, and had been employed for 23 years by, Super Valu Stores, Inc., a publicly-owned corporation of which Mr. Olsen owned less than 2% of the stock. The salary and bonus due Mr. Olsen for his services up to the date of his

death were paid to his estate. The amount due under the terms of a profit-sharing pension trust established by the corporation ($13,623) was paid to Mrs. Olsen as the designated beneficiary of Mr. Olsen. There was no contract or understanding requiring any further payments to be made (App. 11a-12a).

On October 25, 1955, the board of directors of the corporation adopted the following resolution (App. 12a).

> WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and
>
> WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position:
>
> NOW, THEREFORE, BE IT RESOLVED that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely, Mrs. Hazel Dart Olsen, $5,000.00 by reason of his death, said amount to be payable forthwith in cash.

The $5,000 payment thus authorized was paid to Mrs. Olsen on October 27, 1955. The corporation deducted the payment as a miscellaneous business expense on its income tax return. On her return, Mrs. Olsen noted the receipt of the $5,000 as "a gratuity in recognition of past services of" Mr. Olsen but claimed that it was a gift excludible from income under § 102(a) (App. 12a-13a). The Commissioner held that the payment was not a gift and determined a deficiency

accordingly.[2] The taxpayers (Mrs. Olsen and her husband's estate, with which she had filed a joint return) petitioned the Tax Court for a redetermination of the deficiency.

In addition to the above facts, the only evidence offered at the trial was the testimony of Russell H. Byerly who, as a director and executive vice president of the corporation, had voted for the resolution. Asked why he had been in favor of the resolution, he replied (Tr. 22-23):

> A. Mr. Olsen's death was quite sudden, he had long, distinguished and faithful service with our company. We felt that this payment to his widow at that time was in order and felt that she probably could use the money under those circumstances.

He testified that a similar payment had been made to the widow of a vice-president who had died several years before Mr. Olsen and that another such payment had been authorized since Mr. Olsen's death, but that there was no established policy governing the making of such payments (Tr. 24-25).

The Tax Court found that (App. 13a):

> The dominant reason for the corporation's action in making the $5,000 payment to the peti-

[2] If not a gift, the $5,000 payment was nevertheless excludible under § 101(b) of the 1954 Code, which excludes, up to $5,000, amounts paid by an employer to an employee's beneficiaries "by reason of the death of the employee"—an exclusion for which, it may be noted, the resolution seems to have been specifically drafted to qualify. Qualification as a "gift" remains important, however, for if the payment under the resolution is excludible as a "gift" under § 102(a), the death-benefit exclusion under § 101(b) remains available to be applied against the $13,623 paid to Mrs. Olsen by the profit-sharing trust. If the $5,000 payment is not a gift, on the other hand, it will exhaust the exclusion available under § 101(b) and leave the trust payment taxable in full.

tioner-widow was that the decedent had rendered valuable services to the corporation, in the performance of unusual duties and responsibilities over a long period of years; and the payment proceeded primarily from the constraining force of a moral duty.

Negatively, the court found that the "dominant reason" for making the payment was *not* "detached and disinterested generosity" or "affection, respect, admiration, charity or like impulses" (App. 16a). The court concluded that the payment, having been made because of the husband's services, was not a "gift" (App. 14a-16a). The Court of Appeals for the Eighth Circuit reversed the conclusion of the Tax Court as "clearly erroneous." Since Mr. Olsen had already been fully compensated for his services, "the only reasonable inference" from the undisputed evidence, the court said, was "that the payment * * * was a gift." (App. 7a).

REASONS FOR GRANTING THE WRIT

This case is in all material respects identical to *Kuntz* v. *Commissioner*, 300 F. 2d 849 (C.A. 6), in which we are simultaneously filing a petition for certiorari. Like the *Kuntz* case, the decision here, reversing the Tax Court's conclusion that the payment was not a gift, is in direct conflict with the decisions of the Third Circuit affirming substantially identical findings by the Tax Court in *Smith* v. *Commissioner* and *Martin* v. *Commissioner*, decided June 28, 1962. For that reason, as more fully stated in our petition in the

Kuntz case, the petition for certiorari in this case should be granted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

AUGUST 1962.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,884

ESTATE OF W. R. OLSEN, Deceased, KENNETH M. OWEN and FIRST NATIONAL BANK OF MINNEAPOLIS, Co-Executors, and HAZEL D. OLSEN, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of Decision of The Tax Court of the United States.

[May 4, 1962.]

Before SANBORN and MATTHES, Circuit Judges, and GRAVEN, District Judge.

SANBORN, Circuit Judge.

The petitioners seek a review and reversal of an unreported decision of the Tax Court, filed May 31, 1961, holding that a $5,000 payment made October 27, 1955, to Hazel D. Olsen, the widow of W. R. Olsen, by Super Valu Stores, Inc., the corporation of which he was an officer and director, was not a nontaxable gift to the widow within the meaning of section 102(a) of the Internal Revenue Code of 1954, 26 U.S.C. 1958 ed. § 102(a).[1]

The evidentiary facts are undisputed. W. R. Olsen died September 12, 1955, at the age of 67. He was then secretary-treasurer of Super Valu Stores, Inc. He had been in its employ for more than 23 years. Compensation for his services was paid in full by the corporation up to the time of his death. He owned 3,338 of the

[1] "§ 102. GIFTS AND INHERITANCES.

"(a) *General Rule.*—Gross income does not include the value of property acquired by gift, * * *."

181,479 shares of the common capital stock of the corporation. His wife owned 336 shares, and his son 150. There was no promise or agreement between Mr. Olsen and the corporation that his wife should, upon his death, receive any payment from it. It had no plan or policy of making payments to widows of deceased officers or employees. It had on one prior occasion made a payment to a widow of a vice-president. Mrs. Olsen was not an employee of the corporation, and performed no services for it in connection with the payment in suit.

The resolution authorizing the payment was adopted at a special meeting of the Board of Directors of the corporation held on October 25, 1955, and reads as follows:

> "WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and
>
> "WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position;
>
> "NOW, THEREFORE, BE IT RESOLVED that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely, Mrs. Hazel Dart Olsen, $5,000.00 by reason of his death, said amount to be payable forthwith in cash."

Russell W. Byerly, president of the corporation, a witness at the trial, upon being asked his reason for favoring the payment to Mrs. Olsen, testified:

> "Mr. Olsen's death was quite sudden, he had long, distinguished and faithful service with our

company. We felt that this payment to his widow at that time was in order and felt that she probably could use the money under those circumstances."

The corporation, in its income tax return for 1955, deducted the $5,000 payment to Mrs. Olsen under "Other Deductions." The petitioners in their joint income tax return for 1955 did not include the payment as income, and made the following statement in their return:

"In 1955 Hazel D. Olsen, the widow of W. R. Olsen, received from Super Valu Stores, Inc., Hopkins, Minnesota, the former employer of said W. R. Olsen, the sum of $5,000.00 as a gratuity in recognition of past services of said W. R. Olsen. It is the position of taxpayer that said amount is not taxable to her."

The Commissioner determined that the payment was income, and assessed a deficiency.

The Tax Court, on review, sustained the Commissioner, in reliance upon *Estate of Mervin G. Pierpont* v. *Commissioner*, 35 T.C. 65, and what it considers to be the teachings of *Commissioner* v. *Duberstein*, 363 U.S. 278. On petition to review the decision of the Tax Court in the *Pierpont* case that donations made to the widow of Mervin G. Pierpont by the Loewy Drug Company, of which he had, for many years, been president and the majority stockholder, were income, the Court of Appeals for the Fourth Circuit,[2] on March 21, 1962, vacated the decision of the Tax Court and remanded the case, saying (p. ... of ... F. 2d):

"Nevertheless, none of the facts stipulated in the present case touches upon these additional fac-

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[2] *Poyner, et al., Executors of Estate of Mervin G. Pierpont* v. *Commissioner*, ... F. 2d ...

tors which since *Duberstein* have been important. The stipulations were made before *Duberstein* and covered only the criteria which had up to that time been formulated and treated by the Tax Court and this circuit as decisive. It would be unfair now to allow findings to stand, which are adverse to the taxpayer, because of her silence on matters never deemed pertinent in earlier litigation. While, as we have indicated, it is perfectly proper for the court to broaden the field of inquiry beyond that previously established, this should not be done without affording an opportunity to the taxpayer, and to the Government as well, to amplify the record. Of course, we do not undertake to dictate the result to be reached upon the broadened inquiry. Additional data which the parties will be free to produce may have the effect of confirming or overcoming the result which the five *Luntz* [*Florence S. Luntz* v. *Commissioner*, 29 T.C. 647, 650 (1958)] factors,[3] standing alone, were held to require in the earlier cases."

The Court of Appeals for the Sixth Circuit, in *Estate of Martin Kuntz, Sr.* v. *Commissioner*, ... F. 2d ..., decided April 4, 1962, reviewed and reversed a decision of the Tax Court that a donation made to the widow of Martin Kuntz, Sr., upon the death of her husband,

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[3] The factors, quoted in the opinion of the Court of Appeals in *Pierpont*, are (page ... of ... F. 2d):

"(1) [T]he payments had been made to the wife of the deceased employee and not to his estate; (2) there was no obligation on the part of the corporation to pay any additional compensation to the deceased employee; (3) the corporation derived no benefit from the payment; (4) the wife of the deceased employee performed no services for the corporation; and (5) the services of her husband had been fully compensated."

by the Peter Kuntz Company, by which he had been employed for many years and of which he was president at the time of his death, was not excludable from gross income as a gift. The last sentence of the resolution of the Board of Directors of the Kuntz Company was: "This payment is made as additional compensation and in consideration of services heretofore rendered to this corporation by the late Martin C. Kuntz, Sr." There was evidence to the contrary. The Court of Appeals said (page ... of ... F. 2d):

> "We hereby adopt the reasoning and rationale of the *Kasynski* case [*United States* v. *Kasynski*] (284 F. 2d 143, 10 Cir., 1960) in relation to the merits of the instant case. In that opinion the court found that the finding of the lower court—that the intent of the transferor was to make a gift—was a reasonable inference from the 'factual pattern' there present. We here hold that such a finding is the only reasonable inference from the 'factual pattern' *here* present, and that the contrary factual finding by the Tax Court leaves us with 'the definite and firm conviction that a mistake has been committed.' * * *"

If the payment made to Mrs. Kuntz upon the death of her husband was a gift, so was the payment to Mrs. Olsen which the Tax Court has found was not a gift. In *United States* v. *Genevieve E. Frankel*, ... F. 2d ..., we affirmed a determination of the District Court that donations made under similar circumstances to Mrs. Frankel were nontaxable gifts.

The Tax Court, in the instant case, said in its opinion:

> "* * * [T]he dominant reason for the action of Super Valu Stores, Inc., in making the $5,000 payment to the petitioner-widow was that the decedent

had rendered valuable services to the corporation in the performance of unusual duties and responsibilities over a long period of years; and that the payment proceeded primarily from the 'constraining force of [a] moral * * * duty.' "

We are not aware that a corporation has any moral obligation or duty to make any payment to a widow of a deceased officer or employee who, while he lived, was fully compensated for his services. There is no evidentiary basis for an inference that W. R. Olsen was underpaid. There was evidence that he was fully compensated to the time of his death.

This case was tried and submitted to the Tax Court on May 16, 1960. *Commissioner* v. *Duberstein* (363 U.S. 278) was decided by the Supreme Court on June 13, 1960. The record in the Tax Court was based on facts which at the time of trial were adequate to support the conclusion that the payment to Mrs. Olsen was a nontaxable gift. See and compare: *Louise K. Aprill* v. *Commissioner*, 13 T.C. 707 (1949); *Estate of Arthur W. Hellstrom* v. *Commissioner*, 24 T.C. 916, 920 (1955); *Estate of John A. Maycann, Sr.* v. *Commissioner*, 29 T.C. 81 (1957); *Florence S. Luntz* v. *Commissioner*, 29 T.C. 647 (1958); *Bounds* v. *United States*, 4 Cir., 262 F. 2d 876, 881-883 (1958); *Reed* v. *United States* (D.C. W.D.Ky.) 177 F. Supp. 205, 208-209 (1959); aff'd 6 Cir., 277 F. 2d 456 (3/7/1960); *United States* v. *Kasynski*, 10 Cir., 284 F. 2d 143 (a *post-Duberstein* opinion). We could vacate the judgment under review and remand the case to the Tax Court for further proceedings to afford the parties an opporunity to amplify the record, as was done in the *Pierpont* case. The petitioners have not asked that the case be remanded, nor has the Commissioner. Apparently the parties prefer to stand upon the present record. To

remand the case would, in all probability, serve no useful purpose.

The wording of what is now Section 102(a) of the Internal Revenue Code of 1954 is identical with that of Section 22(b)(3) of the Code of 1939, under which the Tax Court and other courts had consistently held that a donation such as that made to Mrs. Olsen was a "gift." There is no reason to believe that Congress in 1954 had any intent to subject to taxation gifts to widows formerly excludable from income under the 1939 Code.

We think that the only reasonable inference to be drawn from the undisputed evidence is that the payment to Mrs. Olsen was a gift and was not taxable. In *Bogardus* v. *Commissioner*, 302 U.S. 34, 40, the Supreme Court said:

> "* * * If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation. * * *"

We hold that the determination of the Tax Court that the $5,000 payment made by the Super Valu Stores, Inc., to Mrs. Olsen was not excludable from gross income as a "gift" is clearly erroneous.

The decision of the Tax Court is reversed.

Judgment

This cause came on to be heard on the Petition to review the Decision of The Tax Court of the United States entered June 30th, 1961, determining that there is a deficiency in the income tax of the petitioners for the taxable year 1955, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of The Tax Court in this cause be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said Tax Court for proceedings not inconsistent with the opinion of this Court this day filed herein.

May 4th, 1962.

T. C. Memo. 1961-161

TAX COURT OF THE UNITED STATES

ESTATE OF W. R. OLSEN, Deceased, KENNETH M. OWEN and FIRST NATIONAL BANK OF MINNEAPOLIS, Co-Executors, and HAZEL D. OLSEN, *Petitioners*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket No. 73094 Filed May 31, 1961.

Held, that the sum of $5,000 which a corporation paid to the widow of a deceased officer of said corporation, does not constitute a "gift" within the meaning of section 102(a) of the 1954 Code. Principles declared in *Commissioner* v. *Duberstein*, 363 U.S. 278, and in *Estate of Mervin G. Pierpont*, 35 T.C. 65, here applied.

Robert J. Johnson, Esq., for the petitioners.
Joseph D. Skinner, Esq., for the respondent.

Memorandum Findings of Fact and Opinion

PIERCE, *Judge.*

The Commissioner determined a deficiency in petitioners' income tax for the year 1955, in the amount of $2,338.97. This deficiency resulted solely from the Commissioner's determination that the sum of $5,000, which a certain corporation paid to petitioner Hazel D. Olsen by reason of the death of her husband who had been the secretary-treasurer and a director of said corporation, was not excludable from said petitioner's income as a "gift," within the meaning of section 102(a) of the 1954 Code. The Commissioner determined also that, since the maximum exclusion in respect of "employees' death benefits," which is provided by section 101(b)(2)(A) of said Code, had already been applied by petitioners on their return against a profit-sharing trust distribution which said petitioner received, her ordinary income should be increased in the amount of $5,000.

The petitioners, in their petition filed herein, assigned two errors with respect to said determinations, to wit:

(a) Respondent erred in determining that the sum of $5,000 paid to Hazel D. Olsen by Super Valu Stores, Inc. in 1955 was taxable income[,] in that said amount constituted a gift excludable from gross income under Section 102 of the Internal Revenue Code of 1954.

(b) In the alternative, if respondent was correct in determining that said $5,000 payment made by Super Valu Stores, Inc. in 1955 constituted taxable income, then respondent erred in failing to apply the $5,000 exclusion permitted by Section 101(b) of the Internal Revenue Code of 1954 against said amount rather than against the

lump sum distribution received by said Hazel D. Olsen in 1955 from the profit-sharing plan of said W. R. Olsen's employer, in that said $5,000 exclusion should be applied in such manner as will result in the maximum tax benefit therefrom.

The alternative issue raised by the second assignment has now been eliminated. The Commissioner has agreed on brief, that the above-mentioned exclusion in respect of "employees' death benefits," may be applied in its entirety against the $5,000 which petitioner Hazel D. Olsen received directly from Super Valu Stores, Inc., rather than against the distribution which she received from the trustee of the corporation's profit-sharing trust; provided, that the aggregate amount so excluded does not exceed the statutory limitation of $5,000.

Thus, the sole remaining issue for decision is, whether the said sum of $5,000, which petitioner Hazel D. Olsen received from the corporation by reason of her husband's death, is excludable from her income as a "gift," within the meaning of section 102(a) of the 1954 Code.

FINDINGS OF FACT

Most of the facts have been stipulated. The stipulation of facts, together with the exhibits thereto attached, is incorporated herein by reference.

W. R. Olsen (herein called the "decedent") died on September 12, 1955, at the age of 67 years, leaving him surviving: His widow Hazel D. Olsen, who is a resident of Minneapolis, Minnesota; and a son, W. R. Olsen, Jr. The duly qualified and acting coexecutors of the decedent's will are, the First National Bank of Minneapolis, and Kenneth W. Owen. These executors

joined with the widow in filing a joint income tax return for the year 1955 which is here involved; and said executors and the widow are the petitioners herein.

The decedent, at the time of his death, was secretary-treasurer and also a director of Super Valu Stores, Inc., of Hopkins, Minnesota, which engaged in the wholesale food distribution business, and which had approximately 1,450 employees. Decedent had, until his death, been employed by this corporation for over 23 years. The petitioner-widow was not an employee of the corporation at any time here material.

At the time of decedent's death, the corporation had 181,479 shares of common stock outstanding, of which the decedent owned 3,338 shares, his wife owned 336 shares, and his son owned 150 shares. There were some 720 common stockholders.

For the year of his death, the decedent was paid salary and bonuses by the corporation, totaling $16,151.84—some of which amount was received by his executors after his death. None of such compensation is here involved.

Following the decedent's death and in the year 1955, the petitioner-widow received from the trustee of said corporation's qualified profit-sharing trust, the sum of $13,623.65. This amount was paid to her as the decedent's designated beneficiary, by reason of his death; and it constituted full payment and distribution to her of all amounts credited to the decedent on the trust's accounts, up to the time of his death. This distribution is here only indirectly involved.

On October 27, 1955, the petitioner-widow received from the corporation, the sum of $5,000. This payment which is here directly involved, was paid to her pursuant to the following resolution of the corporation's board of directors, approved at a special meeting of said board held on October 25, 1955:

WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and

WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position;

NOW, THEREFORE BE IT RESOLVED that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely, Mrs. Hazel Dart Olsen, $5,000.00 by reason of his death, said amount to be payable forthwith in cash.

The corporation did not have any agreement with decedent that any such payment would be made in the event of his death. Also, it had no general plan or policy for making payments to widows of its officers or employees; although it had, on one previous occasion, made such a payment to the widow of one of its vice-presidents.

The taxpayer-widow was not required to, and did not, perform any services for the corporation in connection with said $5,000 payment.

The corporation, in its 1955 income tax return, deducted the $5,000 payment to the taxpayer-widow, under the category of "Other deductions"; and it referred to this deduction in a supporting schedule as "Miscellaneous."

The taxpayers, in their joint income tax return for the year 1955, treated the above-mentioned $13,623.65 which the taxpayer-widow had received from the trustee of the profit-sharing trust, and the above-mentioned

$5,000 which she had received directly from the corporation, as follows:

(1) They treated the $13,623.65 distribution from the trustee, as an "employee's death benefit" within the meaning of section 101(b)(1) of the 1954 Code; deducted therefrom the sum of $5,000, representing the maximum exclusion allowable under section 101(b)(2)(A); and reported the remainder of said distribution ($8,623.65) as taxable long-term capital gain.

(2) They did not include in income, any portion of the $5,000 which the taxpayer-widow had received directly from the corporation; but instead they attached an explanatory statement to the effect that this amount was received "as a gratuity in recognition of past services of said W. R. Olsen [the decedent]"; and that they regarded the same to be nontaxable.

Ultimate Findings

The dominant reason for the corporation's action in making the $5,000 payment to the petitioner-widow was that the decedent had rendered valuable services to the corporation, in the performance of unusual duties and responsibilities over a long period of years; and the payment proceeded primarily from the constraining force of a moral duty.

Said payment was not intended to be, and does not constitute, a "gift" within the meaning of section 102(a) of the 1954 Code.

Opinion

The issue here presented is substantially the same as that which was before this Court in the recent case of *Estate of Mervin G. Pierpont*, 35 T. C. 65, now pending on appeal to the Court of Appeals for the Fourth Circuit. It is our view that the principles therein announced are here applicable.

In said case, we pointed out that the Supreme Court, in *Commissioner* v. *Duberstein*, 363 U.S. 278 (June 13, 1960), had dealt with the vexatious and frequently recurrent question as to what the guiding criteria should be in determining whether a specific transfer without consideration, constitutes a "gift" within the meaning of the pertinent statutory provision.[1] And we there concluded that, although the Supreme Court had declined to lay down the new "test" urged by the Government, its opinion had gone a long way toward bringing the problem back into proper focus, thereby clarifying and developing the law in this troublesome area. We also pointed out in the *Pierpont* case, that the Supreme Court had noted, in its opinion in the *Duberstein* case, that a voluntary transfer (363 U.S. 278, 285) "without any consideration or compensation therefor, though a commonlaw gift, is not necessarily a 'gift' within the meaning of the statute"; and that the Supreme Court further stated (pp. 285-286):

> And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus* v. *Commissioner*, 302 U.S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in re-

[1] Internal Revenue Code of 1954.

SEC. 102. GIFTS AND INHERITANCES.

(a) General rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

turn for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson* v. *United States*, 343 U.S. 711, 714. A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner* v. *LoBue*, 351 U.S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson* v. *United States*, *supra*, at 714. And in this regard, the most critical consideration, * * * is the transferor's "intention." *Bogardus* v. *Commissioner*, 302 U.S. 34, 43. 'What controls is the intention with which payment, however voluntary, has been made.'

* * * * * * *

* * * We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his [the transferor's] conduct was in fact—the dominant reason that explains his action in making the transfer. * * *

Applying the foregoing guiding principles in the instant case, we are convinced from our consideration and weighing of all the evidence herein (and we have hereinabove found as an ultimate fact), that the dominant reason for the action of Super Valu Stores, Inc., in making the $5,000 payment to the petitioner-widow was that the decedent had rendered valuable services to the corporation in the performance of unusual duties and responsibilities over a long period of years; and that the payment proceeded primarily from the "constraining force of [a] moral * * * duty." This conclusion finds support in the wording of the resolution made by the corporation's board of directors at the time when the payment was authorized; and also in the statement made by the petitioners in their return, that such payment was "in recognition of past services of

said W. R. Olsen [the decedent]." It may be noted also, for what it is worth, that the corporation deducted said payment as a "miscellaneous" expense on its return. We have concluded also that petitioners have failed to carry their burden of establishing that the corporation's "dominant reason" for making the payment proceeded from a "detached and disinterested generosity," and "out of affection, respect, admiration, charity or like impulses."

We think it unnecessary, in view of the clarification of this general subject by the opinion in the *Duberstein* case, to discuss the numerous decisions heretofore entered (either prior to said opinion or without consideration of the principles therein set forth) which have dealt with payments by employers to widows of deceased employees. As we said in the *Pierpont* case, *supra*: "[E]ach case must turn upon its own record, since we think it plain under the *Duberstein* opinion that there is no 'rule of law' or litmus paper test that provides an automatic answer in such cases." We believe that each specific case must be decided on its own particular facts, as appraised in the light of the principles expounded in the *Duberstein* opinion. In addition, we think that *Reed* v. *United States*, 177 F. Supp. 205, affd. without discussion, 277 F. 2d 456, and *Cowan* v. *United States*, ... F. Supp. ..., are each distinguishable on its facts.

We hold, on the basis of all the foregoing, that the $5,000 payment to the petitioner-widow, was not intended to be, and did not constitute, a "gift" within the meaning of section 102(a) of the 1954 Code.

We further hold, in conformity with the above-mentioned alternative position of petitioners and respondent's above-mentioned agreement therewith, that the maximum exclusion in respect of "employees' death benefits" which is provided by section 101(b)(2)(A)

f the 1954 Code, should, in the recomputation under ule 50, be applied in its entirety against said $5,000 ayment from the corporation; and that none of such xclusion should be applied against the amount of the istribution which the petitioner-widow received from he trustee of the profit-sharing trust.

Decision will be entered under Rule 50.

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No. 395

In The

Supreme Court of the United States

OCTOBER TERM, 1962

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF W. R. OLSEN, Deceased, KENNETH M. OWEN, ET AL., Executors, and HAZEL D. OLSEN

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Estate of W. R. Olsen, Deceased, Kenneth M. Owen, et al., Executors, and Hazel D. Olsen respectfully pray that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in the above-entitled case be denied.

QUESTION PRESENTED

The question presented is whether a voluntary payment made by an employer to the widow of a deceased employee, under all of the facts and circumstances of this particular case, constituted a "gift" within the meaning of §102(a) of the Internal Revenue Code of 1954.

STATEMENT

This case concerns the provision of the Internal Revenue Code which recently was before this Court in *Commissioner v. Duberstein*, 363 U.S. 278, and which excludes from the gross income of a taxpayer "the value of property acquired by gift."[1] It poses the question whether a specific transfer to a taxpayer under all of the circumstances surrounding the transfer in fact amounted to a "gift" to her within the meaning of the statute. The case literally turns upon all of its facts and therefore it is unavoidable that we state those facts in some detail.

W. R. Olsen died from pneumonia following surgery on September 12, 1955, at the age of sixty-seven, after a period of illness of about one week (R. 14, 43). At the time of his death he was actively employed as Secretary-Treasurer by Super Valu Stores, Inc., Hopkins, Minnesota, and had been employed by said employer for more than twenty-three years (R. 14).

Super Valu Stores, Inc., is a company engaged in the wholesale food distribution business, having in the neighborhood of 1,150 employees (R. 41). At the time of the death of Mr. Olsen, there were outstanding 181,479 common shares of said Super Valu Stores, Inc. (R. 14). Of this amount, 3,338 shares were owned by Mr. Olsen, 336 shares by his widow, Hazel D. Olsen, and 150 shares by W. R. Olsen, Jr., his son (R. 14). Super Valu Stores, Inc., stock is traded over-the-counter and there were some 720 common shareholders of said corporation at the time of the death of Mr. Olsen (R. 14).

Following the death of Mr. Olsen, Mrs. Olsen on October

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[1] The operative provision in the case at bar is §102(a) of the 1954 Internal Revenue Code. The corresponding provision of the 1939 Code which was considered by this Court in *Duberstein* was §22(b)(3). The two sections are identically worded, and we do not understand petitioner to assert any distinction between the two sections.

4, 1955, received the sum of $13,623.65 from First National Bank of Minneapolis, as trustee of a qualified profit sharing trust of Super Valu Stores, Inc. (R. 14). This amount was paid to Mrs. Olsen as the designated beneficiary by reason of the death of Mr. Olsen and constituted full payment of all amounts which had been credited to Mr. Olsen up to the time of his death (R. 14).

At the time of his death Mr. Olsen was being compensated by a salary and bonus from his employer and all compensation due him through the date of his death was paid (R. 14, 47).

At a special meeting of the Board of Directors of Super Valu Stores, Inc., held on October 25, 1955, the following resolution was approved:

> "WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and
>
> "WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position;
>
> "NOW, THEREFORE, BE IT RESOLVED, that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely Mrs. Hazel Dart Olsen, $5,000 by reason of his death, said amount to be payable forthwith in cash." (R. 15, 26.)

On October 27, 1955, the said $5,000.00 payment was made by Super Valu Stores, Inc., to Hazel D. Olsen (R. 15). It is the proper tax treatment of this payment, in the hands of Mrs. Olsen which is at issue in this case.

Mr. Russell H. Byerly, the then executive vice president and a member of the Board of Directors of Super Valu Stores, Inc., testified at some length concerning the facts surrounding the payment (R. 42-53). Mr. Byerly testified that he was familiar with the circumstances surrounding Mr. Olsen's

death and that Mr. Olsen had been ill only a "very short time, I think about a week" prior to his death (R. 42-43). Mr. Byerly further testified that he had participated in the decision to make the payment to Mr. Olsen's widow (R. 43), and had recommended to the other members of the Board that the payment be made because:

> "Mr. Olsen's death was quite sudden, he had long, distinguished and faithful service with our company. We felt that this payment to his widow at that time was in order and felt that she could probably use the money under those circumstances." (R. 49-50).

Mr. Byerly further testified that consistent views were expressed by the president of the company prior to the meeting (R. 48).

Mrs. Olsen was not employed by Super Valu Stores, Inc., at the time of such payment, was not required to, and did not perform, any services for the company in connection with this payment (R. 45, 47). The payment was not made because of any promise to or agreement with Mr. Olsen that any such payment would be made in the event of his death (R. 43). Super Valu Stores, Inc., did not have in 1955, and does not now have, any general plan or general policy for the payment of any death benefit or other amounts to wives of deceased officers or employees (R. 43, 44).

The receipt of the payment was reported in respondent's joint 1955 Federal income tax return but the payment was excluded from gross income as nontaxable gratuity (R. 23).

The Tax Court held that, since the decedent had rendered "valuable services to the corporation" the payment to Mrs. Olsen "proceeded primarily from the constraining force of a moral duty" and "was not intended to be a gift" (R. 64, 66). The opinion of the Tax Court stated that the Court arrived at its determination from its "consideration and weighing of all the evidence" (R. 66). However, nowhere in the

findings of fact nor opinion of the Tax Court is mention made of what petitioner here has correctly referred to as "the only evidence offered at the trial", viz., the testimony of Mr. Byerly.

The Court of Appeals for the Eighth Circuit reversed as "clearly erroneous" the conclusion of the Tax Court. The Court of Appeals summarized all of the facts just set out, including Mr. Byerly's testimony, from which it extracted the passage quoted above. The Court noted that the Tax Court has sustained the Commissioner solely "in reliance upon Estate of Marvin G. Pierpont v. Commissioner, 35 T.C. 65, and what it considers to be the teachings of Commissioner v. Duberstein, 363 U.S. 278. * * *" 302 F.2d at 672. The Court observed that in *Pierpont* the decedent was "the majority stockholder" of the company making the donation. *Ibid.* Here, as noted above, the decedent and his family owned less than two per cent of the outstanding shares of Super Valu, Inc. The Court quoted copiously from the decision of the Court of Appeals for the Fourth Circuit vacating the decision of the Tax Court in *Pierpont* and remanding that case, but correctly noted that in the instant case the Commissioner did not ask that the case be remanded but preferred "to stand upon the present record." 302 F.2d at 674. The Court of Appeals concluded that upon the state of the record made below, "the only reasonable inference to be drawn from the undisputed evidence" was that "the payment to Mrs. Olsen was a gift and was not taxable." *Ibid.*

ARGUMENT

The petitioner in this case, and in the other cases for which a writ of certiorari is sought[2], relies entirely upon asserted "conflicts" arising out of allegedly varying interpretations by lower courts of the recent decision of this Court in the *Duberstein* and *Stanton* cases. However, petitioner, in none of the petitions, pays more than lip-service to those decisions of this Court. Instead, we submit that a fair-minded evaluation of the petitions makes it inescapably clear that petitioner is not addressing himself to the question of what *Duberstein* and *Stanton* decided but rather is concerned with what he thinks this Court *should* have decided in those cases. What the petitions quite blatantly seek is a rehearing of the same propositions unsuccessfully advanced in *Duberstein* and *Stanton*.

Certiorari was granted in *Duberstein* and *Stanton* "partly because of a claimed difference in the approaches between two Courts of Appeals; but primarily on the Government's urging that, in the interest of the better administration of the income tax laws, clarification was desirable for determining when a transfer of property constitutes a 'gift' and is not to be included in income for purposes of ascertaining the 'gross income' under the Internal Revenue Code." (363 U.S. at 294-95.) The Government argued that "motive" rather than "intent" should be the test of taxability, that a gift should be defined as a transfer motivated by "personal" rather than "business" reasons, that since a corporation ordinarily is without authorized power to make a gift and is not subject to the gift tax, any payment by a corporation should be considered taxable income. *Ibid.* The arguments were rejected by this Court. These are the same arguments

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[2] *Kuntz v. Commissioner*, 300 F.2d 849 (6th Cir.); *United States v. Frankel*, 302 F.2d 766 (8th Cir.).

which the Government has urged at each point in the litigation of these cases.

There is no substance to petitioner's attempts here to differentiate the issues in these cases from the issues in the *Duberstein* and *Stanton* cases. The standards set forth in *Duberstein* and *Stanton* are now the guiding principles for determining what constitutes a "gift" under the statutory exclusion provided by section 102(a). Since transfers to widows in the same manner as transfers to anyone else can qualify as gifts only under section 102(a), those principles plainly govern the taxability or non-taxability of such payments.

Further, the *Stanton* case itself was extremely close on its facts to the facts of these cases, although presenting a much "tougher" case for the taxpayer than these cases. Stanton, it will be recalled, was a corporate officer who, after some disagreement with the directors over the discharge of another employee, tendered his resignation. The resignation was eventually accepted and Stanton was voted a "gratuity" of $20,000 in lieu of any retirement pay. The case afforded this Court ample opportunity to address itself to the same propositions advanced by petitioner in these cases. The fact that the payment in *Stanton* was made to the former employee himself rather than to the widow of a former employee certainly could not have harmed the Government's case for this purpose.

Moreover, both on brief and during oral argument of that case, the Government urged that the decision of this Court in that case would provide principles to govern exactly the sort of cases presented by the instant petitions. In its brief in *Stanton* the Government stated that there were over one hundred decisions dealing with the question of voluntary payments by an employer, many of them quite similar to these cases, and urged that the Court promulgate standards

for governing all such cases. Brief for the United States, *Stanton v. United States*, Supreme Court, October Term, 1959, No. 546, at pp. 5-8, et passim. The specific question of cases such as these came up at least twice in the oral arguments to this Court. Philip Elman, then Assistant to the Solicitor General, during his argument on the *Duberstein* case referred to the cases involving payments to widows of the corporate employees as supporting his contention that the question of whether the recipient has done anything to earn the payment is irrelevant. In the argument on the *Stanton* case the question of payments to widows came up again. Wayne G. Barnett, the Assistant to the Solicitor General, whose name appears on the petitions in the instant case, specifically argued that if the business justification for the use of corporate funds is a feeling of obligation, the payment should be income to the widow. He went on to argue that if it were shown that the corporate shareholders simply liked the widow it would be a gift to her but a dividend to the stockholders.

The petitions in the instant cases advance no valid reason for a rehearing of these arguments. The petition in this case asserts that the decision of the Court of Appeals for the Eighth Circuit in this case and the Court of Appeals for the Sixth Circuit in the *Kuntz* case are "in direct conflict with the decisions of the Third Circuit affirming substantially identical findings by the Tax Court in *Smith v. Commissioner* and *Martin v. Commissioner*, decided June 28, 1962." (Pet. at p. 5.) It may be noted that petitioner fails to mention that two other Courts of Appeal, for the Tenth Circuit and the Fourth Circuit, have also dealt with this problem.[3] Presumably this is because, by no conceivable stretch of the imagin-

[3] *Pierpont's Estate v. Commissioner*, 301 F 2d 287 (4th Cir.); *United States v. Kasmski*, 284 F 2d 143 (10th Cir.).

ation, can any "conflict" be gifrsed from the opinions of the Fourth, Sixth, Eighth and Tenth Circuits in these cases. Nor, upon any more than the most cursory analysis, are the opinions of the Third Circuit in *Smith* and *Martin* in conflict with the views expressed by all of the other circuits.

We will not try the Court's patience with an exhaustive analysis of the myriad differences between the relevant facts of the *Olsen* case and the *Smith* and *Martin* cases, but will point out a few of the more striking differences. The corporations involved in both *Smith* and *Martin* were closely held corporations; in *Olsen* the stock of the corporation was publicly traded and widely held (R. 14). Controlling interests in the corporations involved in both *Smith* and *Martin* were held by the decedent employee and/or his relatives; in *Olsen* the decedent and his family held less than two per cent of the outstanding stock of the corporate employer (R. 14). In both *Smith* and *Martin* the board members authorizing the payment were close relatives of the decedent employee; in *Olsen* there were no such relationships involved. In both *Smith* and *Martin* there was testimony that the resolutions authorizing the payment were adopted without reference to the widow's needs; in *Olsen* the testimony was that due to the "quite sudden" death of the decedent the widow "could probably use the money under the circumstances" (R. 49-50). In both *Smith* and *Martin*, the resolutions adopted provided for payments which were made at the monthly rate of the decedent's salary; in *Olsen* the payment bore no relationship to the decedent's salary (R. 15, 17, 26). In *Martin* there was substantial evidence that corporation had in fact adopted a plan of payments to widows to supplement the officers' pension plan; in *Olsen* the company involved had no plan or policy whatsoever for the payment of any additional death benefits or other amounts to the widows of deceased officers or employees (R. 13, 14). In *Smith* the payments were made

on regular employees' payroll checks, included in the corporation's workmen's compensation policies, and subjected to withholding (for years in which there was no withholding the widow executed a hold harmless agreement on behalf of the corporation). There were no comparable facts in *Olsen*.

To assert that the facts in *Smith* and *Martin* are "substantially identical" with the facts in *Olsen*, set out above at pp. 2-4 of this brief, is little short of irresponsible. To further assert that the Court of Appeals for the Third Circuit "would have affirmed" in *Olsen* is to indulge in totally unfounded speculation. In *Olsen* the Tax Court had given no weight whatsoever to the most critical evidence in the case and the Commissioner was content to stand or fall on the findings made by the Tax Court. To have affirmed in *Olsen* the Court of Appeals for the Eighth Circuit would have had to hold that, there having been past services, there could be, as a matter of law, no "intent" or "motive" or "dominant reason" to make a payment other than to compensate those services, for, on the record, on no other basis could the Tax Court have been affirmed. This, of course, would have put the Court of Appeals in utter disregard of the test as stated by this Court in *Duberstein*, which flatly rejected the proposition just stated. 363 U.S. at 284-85, 287, 288. Nor is there any reason to suppose that the Court of Appeals for the Third Circuit would have sustained the decision of the Tax Court in *Olsen* had it been confronted with that decision. Nothing in the opinions of the Court of Appeals in *Smith* or *Martin* suggests that that Court has adopted the view that an employer cannot, as a matter of law, make a gift to the widow of a deceased employee. Facing a decision which, on the evidence before the trier of fact, could be sustained only on such a proposition of law, and with no request having been made for a remand, it seems reasonable to assume the Court of Appeals would have reversed.

The slender reed upon which petitioner attempts to base a contrary assumption is an aside by the Court of Appeals for the Third Circuit to the effect that the Court cannot "exceed the narrow function" assigned it "regardless of what others have done." However, it is quite clear that the Court of Appeals for the Eighth Circuit, in deciding both *Olsen* and *Frankel*, was extremely alert to the limited scope of review open to the Court. In *Frankel* the Court of Appeals quoted extensively from the observations of this Court that decisions in these cases "must be based ultimately upon the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." Indeed in *Frankel* the Court of Appeals specifically observed that "in the present case the trial judge" has "long experience with the mainsprings of human conduct" which "we, [the Court of Appeals] regard as unsurpassed. * * *" 302 F.2d at 671. In *Olsen* the Court of Appeals applied exactly the same standard of review but was confronted with a wholly arbitrary determination made in utter disregard of the facts presented, so that the Court was "left with the definite and firm conviction" that a mistake had been made in that case. It is difficult to see how the Court could have done otherwise, no matter how restrictive the scope of review. Further, a review of the opinions of the other Courts of Appeals indicates that those courts have a lively appreciation of the "narrow function assigned" to them. It is submitted that the courts of appeal are in fact proceeding case by case, and fulfilling the spirit as well as the letter of this Court's decision in *Duberstein*. An off hand remark by one Court of Appeals, puzzling though it may be, cannot serve to create a conflict where none exists.

In candor, if any conflict has arisen in the application of *Duberstein* it has not been a conflict between courts of appeal, but rather between the Tax Court and every other

lower court. The most casual reading of countless decisions of the Tax Court rendered prior to *Duberstein* makes it perfectly obvious that if the *Olsen* case had arisen prior to that decision, the payment at issue would have been found a gift by the Tax Court. What appears to have happened in *Pierpont* and *Olsen*, frankly, is that the Government was able to sell the Tax Court the exact bill of goods which this Court refused to buy in *Duberstein*. When the Tax Court decided *Pierpont* and *Olsen*, particularly the latter, the Tax Court appears not to have in fact weighed the evidence presented to it but simply to have adopted a new rule of law, *viz.*, that any payment in any way related to an employment situation could not be a gift.

To our knowledge no trial court other than the Tax Court has wandered off on a similar frolic. Further, it now may well be that we are no longer justified in assuming the Tax Court is disregarding the evidence in deciding these cases[4]

[4]Certainly in a number of the fact situations in which the Tax Court has held payments to widows of employees to be income, the Tax Court was undoubtedly right. As has been developed above, the Court may have been justified in the decisions reached in the *Martin* and *Smith* cases. Several of the other recent cases were also probably correctly decided by the Tax Court on the evidence before it. For instance, in *Fischer* v. *Commissioner*, decided February 28, 1961 (1961 P-H T.C. Mem. Dec. paragraph 61,061) and *Russek's Estate* v. *Commissioner*, decided January 31, 1961 (1961 P-H T.C. Mem. Dec. paragraph 61,028), the corporate resolutions setting up the widow pension plan were adopted during the husband's lifetime and stated that they were "for services rendered and hereafter to be rendered" by the employees. The payments clearly were not gifts. Similarly *Cronheim's Estate* v. *Commissioner*, decided August 17, 1961 (1961 P-H T.C. Mem. Dec. paragraph 61,232) pending on appeal (8th Cir.), involved a corporation which "followed a practice of salary continuations for varying short periods of time to widows and surviving minor children of deceased, long-time executives." Further, there the resolution was that "the salary of [the decedent] be continued," was adopted "without consideration of Emily's [the widow's] current or future needs" and the Tax Court also found it "most significant" that the resolution "did not specifically mention Emily either by name or as the widow." The cases of *Westphal* v. *Commissioner*, 37 T.C. 340, pending on appeal (8th Cir.), and *Fenick* v. *Commissioner*, 37 T.C. 999, pending on appeal (3rd Cir.), are close cases. In *Westphal* the Tax Court had before it a resolution "to continue the salary" of the decedent to his widow whom the directors "had never met" and of whose financial needs the directors "had no knowledge", before determin-

In any event, the day by day review of fact finding by trial courts is not the proper function of this Court but of the courts of appeal. There is no evidence which suggests that the Courts of appeal are failing to deal with these problems rationally, consistently and soundly in accordance with the teaching of this Court in *Duberstein*.

Finally, petitioner asserts that this Court should rehear *Duberstein* and *Stanton* because voluntary payments to widows of corporate employees are "common" and present difficult problems of administration which must be "disposed of without flooding the courts with litigation." It is difficult to extend much sympathy, or even credence, to the petitioner's plea for help in formulating an administrative policy in this area. To stem a similar "flood of litigation" under Section 22(b)(3) of the 1939 Code, which, of course, was identical to Section 102(a) of the 1954 Code, the Commissioner ruled with respect to "voluntary payments to widows by their deceased husband's employers" that the service would no longer litigate "cases involving the taxability of such payments unless there is clear evidence that they were intended as compensation for services, or unless the payments may be

ing to whom the payments would be made, company officials "wanted to be sure the payments would constitute a salary deduction to Company." However, the decedent owned only a small part of the outstanding shares of the corporation and subsequent resolutions were adopted after the widow attended a board of directors' meeting and requested that the salary be continued for another six months. In *Penick* the Tax Court took due note of the facts that the widow "was an invalid from arthritis and Parkinson's disease, and it was necessary that she use a wheelchair" and that these facts "were well known to the entire board of directors at the time of the adoption of the resolutions" authorizing the payments. Prior to these payments "the corporation" had never made any payments, as a gift or otherwise, to the widow or family of a deceased officer or director." However, the Court concluded that the payments to the widow "were not made to her because of petitioner's urgent need" and were not gifts. The Tax Court plainly had a difficult time deciding the case and appears to have decided it erroneously. The only question of substance on the appeal would seem to be whether the decision was erroneous "enough" to be "clearly erroneous." For a very recent example of the Tax Court's changed approach to these questions compare *Max Kralstein*, 38 T.C. ... (No. 80), decided September 10, 1962.

considered as dividends." Rev. Rul. 58-613, 1958-2 C.B. 914. Payments "made pursuant to a contract or otherwise binding obligation or pursuant to a plan or statute in effect before the husband's death" were not deemed to be "voluntary" payments within the meaning of the ruling. This was a sensible and workable policy decision. Since the statutory provision involved under the 1954 Code is now conceded by the service to be identical to that under the 1939 Code it would seem entirely reasonable to dispose of the 1954 Code cases on the same basis.

However, if petitioner believes that a "talisman for the solution of concrete cases" is necessary, and he is unwilling to make the judgments necessary under the litigation policy adopted by him under the previous identical statutory provision of the 1939 Code, this Court has already pointed clearly to the next step for petitioner. This Court observed in *Duberstein*, in answer to the same plea, that "* * *. the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement. * * *".

For some time after the enactment of what is now Section 101(b) of the 1954 Code providing for a $5,000 exclusion from gross income of *non-gift* employee death benefits, the Commissioner argued that section meant that no nontaxable *gift* to an employee's survivor could be made in an amount in excess of $5,000. This contention was flatly rejected by the first case to consider it, *United States v. Reed*, 277 F.2d 456 (6th Cir.), *aff'ing per curiam* 177 F. Supp. 205 (W.D. Ky.). The Commissioner then indicated that he would not follow *Reed* "pending further developments on the issue." T.I.R. No. 252, Sept. 12, 1960, republished as Rev. Rul. 60-326, 1960-2 C.B. 32. There were further developments, none of which favored the Commissioner's position. See, e.g., *United States v. Kasynski*, 284 F.2d 142 (10th Cir.); *Cowan v. United States*, 191 F.Supp. 703 (D.C. Ga.), *app'l dism'd* (5th Cir.); *Wilmo v. United States*, 195 F.Supp. 786 (D.C. N.Y.). The Commissioner withdrew the argument on appeal in this case and in the case of *Rice v. United States*, 197 F.Supp. 786 (D.C. Wis.). Finally the Commissioner announced that it would no longer contend that Section 101(b) applied to limit to $5,000 the exclusion from gross income of an amount paid to the widow of a deceased employee "where the payment involved otherwise qualifies as a gift excludable under Section 102(a) of the Code." T.I.R. No. 371, March 19, 1962, republished as Rev. Rul. 62-102, I.R.B. 1962-28, 7.

(363 U.S. at 284-85.) This Court went on to specifically state (363 U.S. at 290):

> "If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter, as it has done in one field of the 'gift' exclusion's former application, that of prizes and awards."

In short, if the Treasury feels the present standards are inadequate, it is for Congress to clarify them. There can be little justification for petitioner's nurturing of uncertainty in taxing statutes, particularly with regard to questions such as here involved, and then complaining of the consequence. Petitioner is no stranger to Congress. There is nothing to prevent him from seeking direct legislative enactment of the tests of "gift" which he failed to persuade this Court to accept in *Duberstein* and which he here renews. Nor is there anything to preclude him from a more frontal legislative attack simply taxing business gifts as income.[9] Legislative approaches along these or similar lines might or might not be sustained by the courts. The point is that the petitioner has many feasible alternatives open to him if he but chooses to avail himself of them.

CONCLUSION

We cannot help but be impressed by the tenacity of petitioner in continuing to press undaunted the same arguments which were specifically rejected by this Court in *Duberstein*. Nonetheless, the fact remains that petitioner has advanced no

[9] In Minnesota, for example, the state legislature enacted a statutory provision to the effect that "gross income" included "amounts paid by or on behalf of an employer, whether as gifts or otherwise, by reason of the death of an employee." M.S.A. Sec. 290.01, Subd. 20. The provision remained on the books for only about a year and a half and was then repealed by virtue of the adoption of a new definition of gross income. Minnesota Laws, Ch. 213, Art. IV, and Ex. Sess. Ch. 51, Sec. 1 (1961), amending M.S.A. Sec. 290.01, Subd. 20.

valid reason for this Court to rehear the matter. Petitioner suggests that there is a conflict among the Circuits in applying *Duberstein*. However, a reasonably dispassionate lawyer-like study of the cases makes it clear that there is no such conflict. Petitioner asserts that there is administrative difficulty in applying the present law. However, this Court has already made it plain that it has no litmus-paper test with which to deal with the "gift-income" problem. Nor, for that matter, has petitioner given indication of any new thoughts or "tests" which he did not advance in *Duberstein*. Therefore no useful purpose would be served by granting certiorari in these cases. If petitioner is confronted with administrative problems, those problems are of his own making and any number of solutions to the problems are at his own fingertips. Petitioner has always the opportunity of seeking legislative change, and he must assume a responsibility in this regard which taxpayers as individuals cannot assume. In any event, petitioner has brought forward nothing here which warrants his asking this Court to repudiate its decisions which were rendered less than 24 months ago and which thoroughly disposed of the identical arguments raised by the petitions in these cases.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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